

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-10/08-462
)
 Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) substantiating abuse of a vulnerable adult.

The petitioner has filed a Memorandum in Support of Objections to These Proceedings asking that the within case be dismissed. Petitioner contends that the actions before the Board of Nursing preclude Board jurisdiction based upon collateral estoppel and res judicata. The parties have briefed the issues.

Board of Nursing

A Stipulation and Consent Order was entered into by the petitioner and the Office of Professional Regulation, Secretary of State, in Docket No. NU43-0107 before the Board of Nursing on April 11, 2007. The Stipulation and Consent Order addressed a number of charges brought against petitioner. One charge included the factual allegations that

form the basis of DAIL's substantiation of abuse of a vulnerable adult.

The salient facts are:

1. Petitioner worked on the oncology ward at Fletcher Health Care during November 2006 as a registered nurse.

2. D.W. was a seventy-three year old patient on the oncology ward during November 2006. D.W. was diagnosed with a life threatening infection secondary to leukemia. Her doctor ordered intravenous administration of Levofloxacin and Vancomycin, two antibiotics.

3. On November 15, 2006, the petitioner failed to administer an antibiotic, Vancomycin, to D.W. Another nurse noticed that the patient's Vancomycin bag was full although it should have been empty. The medication was found on a windowsill 48 hours later.

4. As part of the Stipulation and Consent Order, petitioner received a three month suspension of his nursing license, requirements for reinstatement of his license, and an additional three years of conditions upon his license being reinstated.

DISCUSSION

The Board has long recognized the doctrine of collateral estoppel and has relied on the test articulated in Trepanier v. Styles, 155 Vt. 259, 265 (1990), to determine whether the Board is precluded by the findings in a prior court proceeding from making its own findings in a case. In Re P.J., 2009 Vt. 5 (E.O. 2009), Fair Hearing Numbers 11,444; 13,432; 13,517; 19,147; 19,692, 20,476 and Y-01/08-05. The Trepanier ruling set out the following criteria at page 265:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
- (2) the issue was resolved by a final judgment on the merits.
- (3) the issue is the same as the one raised in the later action.
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) applying preclusion in the action is fair.

See also Alpine Haven Property Owners Assn., Inc. v. Deptula, 175 Vt. 559 (E.O. 2003) (ruling that collateral estoppel be applied when there was substantial overlap in evidence and argument between past and present cases, preparation from first trial covers issues in second proceedings, and the claims are closely related). In Mellin

v. Flood Brook Union School District, 173 Vt. 202 (2001), the Court ruled on page 566 that:

An arbitration award will preclude relitigation of an issue in a subsequent judicial proceeding where the parties and issues in both proceedings are the same, the issues were resolved by a final award on the merits, the arbitration provided a full and fair opportunity to litigate the issues, and it is fair to preclude the subsequent litigation....Issue preclusion applies to issues of fact as well as law. See Restatement (Second) Judgments § 27 (1982) ("When an issue of fact...is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.")...

The parties agree on the facts set out above. The Board can take notice of these facts, but accepting these facts does not lead to a dismissal of this action by the Board. It only means that the Board will not allow relitigation of these particular facts.

The petitioner argues that the Board is precluded from hearing this case and must dismiss this case based upon action taken by the Board of Nursing. The petitioner argues that he agreed to sanctions by the Board of Nursing as part of a settlement of all charges brought before the Board of Nursing. He argues that these sanctions preclude any further action against him such as substantiation of abuse of a vulnerable adult by DAIL and placement on the registry.

The party opposing the imposition of collateral estoppel bears the burden of showing why the case should be heard. Sheehan v. Department of Employment, 169 Vt. 304 (1999). To that end, we will address the Trepanier criteria.

The petitioner argues that DAIL stands in privity with the Secretary of State's Office, Office of Professional Regulation whose prosecuting attorney represented the Office of Professional Regulation before the Board of Nursing because they are both part of state government.¹ DAIL argues that they were not a party to the Board of Nursing case nor do they have privity with the Office of Professional Regulation as they are separate entities charged with different responsibilities.

The Board of Nursing is charged with the responsibility to investigate charges of unprofessional conduct or incompetence by nurses.² 26 V.S.A. § 1574. As part of their authority, they can suspend or revoke licenses or discipline a nurse for a wide variety of reasons. 26 V.S.A. § 1582.

¹ Petitioner also argued that this case should be foreclosed because the participants before the Board of Nursing did not report the suspected abuse of a vulnerable adult to DAIL. The inaction of these individuals does not stop DAIL from performing its independent duties. To the extent any of these individuals were mandated reporters under 33 V.S.A. § 6903, there is potential recourse that can be taken against them for their failure to report.

² The Secretary of State's office provides investigatory and prosecutorial support to different boards through the Office of Professional Responsibility.

In contrast, DAIL is charged with investigating reports of abuse, neglect or exploitation of vulnerable adults. 33 V.S.A. § 6906. In cases where abuse, neglect or exploitation is substantiated, DAIL has the authority to place the substantiated individual upon the registry.³ 33 V.S.A. §§ 6901 *et seq.*

Chapter 69 of Title 33 does not give any other Board or part of state government the authority to substantiate abuse of a vulnerable adult and then place the substantiated individual on the registry. As a result, there was no opportunity to litigate whether petitioner should be placed upon the registry as part of the action before the Board of Nursing.

Although there are cases in which an individual may face both professional censure and substantiation of abuse, this intersection does not preclude either the appropriate licensing board or DAIL from fulfilling their particular statutory responsibilities.

The Board of Nursing is charged with maintaining the professional standards of the nursing profession including the ability to limit or end the license of a nurse who does

³ DAIL also has the authority to expunge substantiation from the registry. A substantiated individual can seek expungement at any time.

not meet those standards. DAIL is charged with protecting the class of vulnerable adults including the ability to investigate a particular action and take appropriate action to protect vulnerable adults through the operation of their registry. Their designated duties, roles, and operation are separate and, as such, DAIL does not stand in privity with the Board of Nursing. However, even assuming there is privity, the argument for dismissal fails for other grounds.

The issues are not the same. The issue of whether a professional has breached his/her responsibilities under a licensing statute is not the same as the issue whether the professional's actions rise to the level of abuse, neglect or exploitation of a vulnerable adult. Whether the petitioner's rose to the legal definition of abuse, neglect or exploitation of a vulnerable adult was not before the Board of Nursing. Moreover, based upon the applicable statutes, the relief DAIL is seeking could not be litigated before the Board of Nursing.

Petitioner raises res judicata. The Board has long recognized the doctrine of res judicata. Res judicata prevents litigation when there is a final judgment in a prior case involving the same parties and cause of action.

Faulkner v. Caledonia Co. Fair Ass'n, 178 Vt. 51 (2004). The

Board has precluded a petitioner from litigating an issue that the petitioner has already brought before the Board.

Fair Hearing Nos. 20,217 and 15,916.

However, there are circumstances in which the Board has denied the application of res judicata. Fair Hearing No. 11,444 is instructive. In that case, the petitioner sought expungement of a child abuse substantiation. The Department argued that the findings of the Family Court in a CHINS action were res judicata as to a finding of abuse under the statute governing substantiation. The Board found that they had jurisdiction to hear the case stating the applicable statute governing expungement gave the Board, not Family Court the authority to rule on expungement requests. In particular, the Board stated on page 5:

The Supreme Court has specifically stated that the human services board is not deprived of jurisdiction to hear matters relating to juveniles that are not part of "a proceeding" over which the juvenile court has exclusive jurisdiction.In Re Susan Kirkpatrick, 147 Vt. 637 (1987).

The result is the same here. Cases seeking substantiation of abuse of vulnerable adults are not within the exclusive jurisdiction of the Board of Nursing; such cases are within the jurisdiction of the Board.

ORDER

The petitioner's Motion objecting to the Board proceedings is denied. The matter is remanded to the Hearing Officer for further action.

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